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P. William Reid
December 20. 1770.

UNTO THE RIGHT HONOURABLE,

The Lords of Council and Session,

22^d Dec
1770
See

T H E
P E T I T I O N
O F

William Reid, eldest son of the deceased Robert Reid Writer to the Signet and his Tutors and Curators, and of the acceding Creditors of the deceased Robert Reid,

Humbly sheweth,

THAT Robert Reid writer to the signet died in March 1766, possessed of fundry heritable subjects, consisting chiefly of tenements in the town of Edinburgh, Fountainbridge, and Canongate, and the property of some feu-duties payable out of the lands of Outerwood of Kilwinning, and others.

Before his death, he executed a nomination of tutors and curators to William Reid, his eldest son, and to his other children, to subsist until they should arrive to years of majority; but he made no other settlement of his affairs.

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As his affairs were left in much confusion, and it appearing doubtful how far there were sufficiency of funds for payment of his debts, the tutors procured the heir served, Mar. 18. 1767 *cum beneficio inventarii*, to his father, and gave up and recorded Mar. 9. & 10. ed inventories, in terms of law, and also gave up and recorded inventories of his moveable subjects; and Mrs Reid, who was one of the tutors, was decerned and confirmed executrix *qua relict* to her husband.

The tutors, for the heir, brought a process before the court of session, against the younger children, and their tutors and curators; in which they likewise called Archibald Stewart merchant in Queensferry, who was a real creditor upon some of the subjects; libelling, That Mr Reid had belonging to him, heritably, certain subjects, particularly therein mentioned: That they, in terms of the act of parliament 1672, made up inventories of the estate and effects belonging to their pupils; which inventories they have produced judicially before the sheriff-depute of Edinburgh; and that, although the yearly rents of the lands and others extended to L. 101 : 10 : 3½ Sterling, including the feu-duties; yet that, after deduction of certain feu-duties, and other public burdens, payable out of the same, the yearly free rent extended only to L. 80 : 18 : 4½ Sterling; and as the heir was burdened with the payment of a life-rent-annuity of L. 40 Sterling to the mother, and that the debts, heritable and moveable, due by his father, amounted to L. 2167 : 15 : 7½ Sterling, of which the yearly interest extended to L. 103 : 4 : 6½ Sterling, so the free yearly rent was more than exhausted; and the fee of the subjects might be adjudged and evicted from the heir: whereas, if the same were sold, the price which would be got would probably be more than twenty years purchase; and consequently the interest of the price would exceed the foresaid free yearly rent; and as the price would be applied for payment of the debts, so the increase of debts, by expence of diligence, and accumulations, would be evited, and a reversion of the subjects,

jects, or price, would be more readily preserved to the minor; and that, consequently, it was necessary, as well as profitable, that the subjects should be sold for payment of the debts; and therefore concluding, That probation ought to be taken of the rental and value, that the price might be liquidated and ascertained by the court; and that the creditors should be ordained to produce their grounds of debt, and to make oath upon the verity thereof; and that it ought and should be found and declared, That it was profitable and necessary that the subjects should be sold for payment and clearance of the debts; and that the tutors and curators should be authorised to sell the whole, or such part of the subjects as should be judged necessary, but not under the price modified by the Lords, and to be applied always for and in payment of the debts due by Robert Reid.

In this process, the rental and value of the subjects were ascertained, as well as the amount of the debts, by the creditors producing their grounds of debt, and deponing on the verity thereof; and thereafter, upon advising the proof, your Lordships pronounced the following interlocutor. "Find the Feb. 21. 1769
 " expediency and necessity of selling the before-mentioned
 " subjects sufficiently instructed; and therefore authorise the
 " pursuer William Reid, and his curators, or quorum of
 " them, to sell and dispose thereof, in whole or in parcels;
 " and to grant all rights and dispositions to the purchasers
 " requisite and necessary, the said subjects being sold at a rate,
 " or rates, not under the value thereof, as proven in the said
 " process; and decerns."

The subjects, being advertised, were exposed to sale of this date; and the first lot, being the subjects at Fountainbridge, Mar. 15. 1769
 was purchased by James Marshall writer to the signet, at the upset-price, being L. 528 : 10 : 7 $\frac{2}{3}$ Sterling. The second lot, being the house and shop in Canongage, was purchased by Henry Anderson shoemaker in Edinburgh, at L. 160 Sterling; and the two shops in Edinburgh, by William Reid tobacconist,

baconist, at L. 550 Sterling; and the feu-duties in and about Kilwinning were purchased by Robert Baillie of Mayvill, at twenty years purchase, and L. 1 more. But none of the purchasers have as yet found caution for the prices, in terms of the articles of roup.

In order to end matters amicably, the petitioners caused make out and sign a submission to arbiters, to ascertain the claims of the creditors, and divide the prices amongst them. But some of the creditors having declined to sign, and two of them, viz. the kirk-treasurer of the parish of Eddleston, on behalf of the poor of the parish, and William Cunningham in Kilwinning, having raised processes of constitution against William Reid the heir, and Mrs Reid the executrix, and having used arrestments upon the dependencies in the hands of the foresaid purchasers of the heritable subjects, upon which they pretend to claim a preference to the other creditors; the heir, and his tutors and curators, and also the purchasers, have been laid under the necessity to bring an action of multiple-pounding before the court, in which they have called all the creditors, that they may debate their respective preferences.

This multiple-pounding having come in course before the Lord Kennet Ordinary, and compearance having been made for the foresaid William Cunningham, and the poor of the parish of Eddleston; and they having produced their grounds of debt, and the arrestments used by them in the hands of the purchasers of the heritable subjects; they contended, That they were preferable, in virtue of their arrestments, to the whole of the other creditors.

The creditors, on the other hand, contended, That these two creditors were intitled to no preference, in virtue of their arrestments; for that William Reid having been served heir *cum beneficio inventarii*, he was not *passive* liable to the creditors, but could only be considered as a trustee for the creditors, and was bound to distribute the price among them; and that

that in this case, the sale was authorised by the court, for the very purpose of paying the creditors ; and which price was therefore payable by the purchasers, to William Reid and his tutors, as trustees for behoof of the whole creditors.

Upon advising mutual memorials, and additional memorial for Stephen Ronaldson and William Cuningham, the Lord Ordinary, of this date, pronounced the following interlocutor. “ The Lord Ordinary, having considered this memorial, with the memorial for the acceding creditors of Robert Reid, and William Reid, and his tutors and curators, and additional memorial for Stephen Ronaldson, finds the said Stephen Ronaldson and William Cuningham, the arresting creditors, preferable on the price of the subjects which belonged to the said Robert Reid.” And thereafter, his Lordship, of this date, refused a representation, and adhered. July 21. 1770.
Dec. 13 1770

Of these interlocutors the petitioners humbly crave your Lordships review. The scope of the petitioners plea is, That in case there shall be a short-coming in the funds, that short-coming should fall proportionally upon the whole creditors ; and that the other two creditors above mentioned should not, in virtue of their diligence, (which, under the circumstances of the case, appeared to the petitioners to be nimious and improper), to the prejudice of the other creditors, draw more than a just and rateable proportion of the funds : and as the petitioners plea seems, with submission, to be strongly founded in equity, so they are hopeful that your Lordships will likewise see good grounds in law for supporting it.

The two arresting creditors founded their plea chiefly upon this, That after the heir hath entered, the debts of his predecessor, whom he represents, become his own proper debts ; and that therefore every manner of diligence must be equally competent to the creditors of the defunct against the heir, for recovery of their payment ; and must be equally effectual to them in competition with one another, as if they had

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been originally creditors of the heir, attaching his estate for his proper debts.

But, in answer to this, the petitioners are humbly advised, that the present question falls to be considered in a very different light from the case of an heir entering to his predecessor, without using the benefit of inventory. Where an heir enters simply to his predecessor, he becomes universally liable to the whole creditors of the defunct; each creditor has the same claim against the heir that they would have had against his predecessor, the original debtor, although the value of the inheritance should fall greatly short of the debts.

But where the heir enters *cum beneficio inventarii*, he does not thereby represent the defunct universally: he is not liable to pay the creditors their full debts, in case the inheritance shall not be sufficient for that purpose. He is under no other obligation, than to render a full account to the creditors for the value of the succession; and accordingly he is considered in the eye of law as a trustee for the creditors; he is considered to hold the estate chiefly and primarily in trust for their behoof. Upon this idea it is, that it has been found, that the heir *cum beneficio* getting eases from some creditors, is obliged to communicate these eases to the other creditors; Dec. 1725, Aikenhead *contra* Russell. And upon the same principle it is, that it was found betwixt the same parties in the 1727, that the heir *cum beneficio* was obliged to communicate to the other creditors the improvements and meliorations he made upon the estate.

Dict. vol. 1.
p. 363.

As therefore the heir *cum beneficio* is considered in the eye of law as a trustee for the creditors, that the estate is truly vested in his person as a trustee for the creditors of the defunct, he must therefore be accountable to them, in the same manner as any ordinary trustee is accountable to the creditors for whose behoof he holds the estate in trust.

Where an estate is disposed to trustees for behoof of any particular set of creditors, (if there is no grounds in law for
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reducing or setting aside the trust-right, as has been found with respect to trust-rights granted by notour bankrupts), it is not in the power of the creditors for whose behoof the trust is created, to create a preference to one another, by any diligence which they may use posterior to the creating of the trust. If they had created a preference before the trust, by diligence or otherwise, the creating of the trust cannot afterwards, without the consent of the creditor, loose or defeat the security he had so obtained; but where no such preference did exist at the date of the trust-right, none of the creditors, by any after diligence, can operate a preference to one another; nor can they have any farther claim against the trustee, or the trust-funds, than for a rateable proportion thereof, effeiring to the extent of their debts.

In like manner, where a creditor of the defunct's had secured a preference upon his estate, that preference will no doubt remain even after the entry of the heir; but where no such preference has been established, as by the entry *cum beneficio*, the estate is vested in the person of the heir, as trustee for behoof of the whole creditors of the defunct; he becomes liable to all and each of the creditors for a rateable proportion of their debts, to the amount of the value of the inheritance; and none of them, by after diligence, can operate a preference to one another, or be allowed thereby to carry a right to more than a just and rateable proportion of the funds.

It is true, that an heir *cum beneficio* may pay *primo venienti*. Where the other creditors lie by, and do not demand payment, the heir is *in bona fide* to exhaust the inventory, by paying such creditors as appear, and demand their payment. And if such creditors are cut out, they have themselves only to blame. It must be owing to their own supine negligence if they are cut out. But, at the same time, although a creditor who receives his payment *bona fide*, will be secure against repetition; yet, as long as the subjects are *in medio*, the creditors who appear, and insist for payment, will be intitled to draw

draw a rateable proportion of the funds ; and where the funds are not sufficient to answer the demands of all the creditors who are insisting for their payment, it will become necessary for the heir to raise a multiple-pounding, and call them all into the field, that the funds may be properly distributed amongst them.

This is similar to the case of an executor confirmed, who is *heres cum inventario in mobilibus*. The executor can exhaust the inventory, by making full payment to such creditors as shall obtain decreets against him ; or, in other words, he can pay, upon decret, *primo venienti*. But if other creditors should appear to a greater extent than will exhaust the inventory, as long as the subjects are *in medio*, and even after decret has been obtained against him, at the instance of some of the creditors, such decreets will give them no preference. The executor is not at liberty to pay to such as have obtained decreets ; but he must bring all creditors who are insisting, into the field by a multiple-pounding, and all those who can instruct themselves to be creditors to the defunct, will obtain a *pari passu* preference upon the funds. The reason is, that an executor is a trustee for the creditors of the defunct ; the funds are vested in his person for their behoof : of consequence every creditor has a claim against him, for a rateable proportion of the funds ; and no creditor is intitled by diligence to operate a preference, and to carry off more than their just proportion. And accordingly it is an established point, That no creditor of the defunct can, by arresting the executry-funds, operate any preference to himself upon these funds, in virtue of arrestments ; but he must come with his claim against the executor ; and every other creditor who puts in his claim as long as the subjects are *in medio*, will have the same preference with those creditors who have arrested.

And as this is the rule as to executors, who are *heredes cum inventario in mobilibus*, there is the same reason why the same rule should obtain in the case of heirs *cum beneficio* in heritage.

tage. And indeed it seems to be pointed out by the statute 1695, that they are to stand upon the same footing. It "statutes and ordains, That, for hereafter, any appearand
 "heir shall have free liberty and access to enter to his pre-
 "decessor *cum beneficio inventarii*, as use is, in executries and
 "moveables."

The arresting creditors were pleased to found upon the case, Janet Scot *contra* Sir Alexander Burnet of Leys, decided 4th July 1724; in which case it was said, that the creditors were found preferable, according to their diligence, upon the price of an estate that was sold by an heir entered *cum beneficio inventarii*. But, with submission, that decision will not apply to the present case. In that case there was no competition of creditors: the question was solely with the heir himself, who, in opposition to the claim of the arresting creditors, founded upon the interest of the other creditors who were not compearing, nor competing, which the heir had certainly neither title nor interest to do. The heir *cum beneficio* is not only *in bona fide*, but is bound to pay *primo venienti*; and where the other creditors do not appear, he is not intitled to found upon their interest, in order to withhold full payment from the creditors who insist.

The petitioners, therefore, do humbly apprehend, that as long as the subjects are *in medio*, every creditor of the defunct is intitled to draw a rateable proportion of the funds; and that no arrestment, or other diligence, used against the heir by any particular creditor, can hurt the interest of such creditors as shall assert their right, while the subjects are *in medio*.

And it is material in this case to observe, that the subjects, the price of which are now arrested, were sold, by authority of the court, for the special purpose of paying the creditors; and that the very creditors who are now compearing, and competing, did all compear in the course of the process, produce their grounds of debt, and swear to the verity of their claims. It was upon their doing so, that the court authori-

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fed the sale; and when that is the case, the sale must be considered as made for behoof of these creditors; and the heir and his tutors, to whom the price is made payable on a double account, must be concluded as trustee for these creditors, and accountable to all and each of them for a rateable proportion thereof: and the right and interest of none of the creditors can be hurt or defeated by any of them proceeding to diligence.

Where a sale is brought, at the instance of an apparent heir, upon the act 1695, the heir is understood to be trustee for the whole creditors of the defunct; and it is now held to be an established point, That none of the creditors, by doing diligence against the heir posterior to the intenting the process of sale, can operate a preference to the other creditors, but all of them will fall to be ranked according as they stood when the sale was brought. Such as had a real lien on the subjects before the sale, will no doubt, notwithstanding of the sale, retain that security; but they cannot create any preference, so as to draw more than a rateable proportion of the funds, by any diligence done posterior to the sale. And if this rule holds in the case of a sale brought at the instance of the apparent heir upon the act 1695, the petitioners, with submission, can discover no reason why the same rule ought not to be held, in the case of a sale by an heir *cum beneficio inventarii*; especially when the same is made by the authority of the court, and that for the special purpose of paying the creditors.

It was said for the arresting creditors, That if the petitioners doctrine was to take place, it would pave the way for much fraud and collusion, betwixt the heir, and any creditors he wanted to favour.

At the same time that the arresting creditors urged the foresaid argument, they did not think proper to point out how, or in what manner, the petitioners doctrine gave occasion

sion to frauds ; and, if the petitioners are not much mistaken, it can have no such effect ; whereas the contrary doctrine may have a strong tendency that way, as the heir would have it very much in his power to prefer his favourites to other creditors. It surely can have no tendency to fraud or collusion, that every creditor should draw a rateable proportion of his debtor's effects, and this is all that the petitioners contend for. On the other hand, if, upon a sale made by the heir *cum beneficio*, creditors were to be preferred upon the price according to the priority of the arrestments, the heir, by giving early notice of a sale to a favourite creditor, would give him an opportunity of attaching the price by his diligence, and thereby securing a preference to all the other creditors.

The petitioner shall only farther observe, that the arresting creditors can at no rate avail themselves of these arrestments, as the sale is not effectual and complete. The purchasers have no effectual right to their purchases, nor is the heir bound to grant them a right.

Your Lordships will be informed, that, by the articles of roup, it is provided, " That the person who shall be preferred as highest offerer to the purchase, shall, under the penalty of one fifth of the price offered, within the space of thirty days after the said roup, grant bond, with one or more sufficient cautioners, to the satisfaction of the exposers, for payment of the price offered, in manner, and at the term before mentioned, with a fifth part of the price so offered, in name of penalty, in case of failzie, by and at-tour performance : and it is further hereby declared, That in case the purchaser shall fail to find caution as aforesaid, the exposers shall be at liberty, either to expose the subjects to sale of new, and to subject the person so failing, to the payment, not only of the penalty, or a fifth part of the sum offered, for not finding caution, but also to the difference of price, in case that the same, at a second roup, be sold at a lower price than that which was so offered ; or, in the

" exposers's

“ exposer’s option, still to oblige such purchaser to find cau-
 “ tion, and perform the articles and conditions, and pay the
 “ price which was offered by them, or to oblige the immedi-
 “ ate preceding offerer, to accept of the said purchase at the
 “ price offered by him, and to grant bond therefor, within
 “ fourteen days after intimation is made of the last offerer’s
 “ failure, to find caution, in terms, and under the penalty,
 “ and with the same certification, as is provided with respect
 “ to the highest offerer.

Your Lordships have already heard, that none of the pur-
 chasers have found caution to this day ; whereby, in terms of
 the articles of roup, they have forfeited all manner of right to
 their purchases, the heir and his tutor cannot be bound to
 give them a valid and an effectual conveyance to the subjects,
 the arrestments must fly off, and cannot intitle the arresters
 to draw any share of the price.

And, 2^{do}, Your Lordships will be informed, that the heir,
 to this day, has not made up proper titles to the subjects by
 infeftment. He has recorded the inventories in terms of the
 statute, and he has served heir in general to his predecessor ;
 but further he has not gone. He has not made up feudal
 titles to any part of the heritage, which therefore remained *in*
hereditate jacente of the defunct ; and they may still be ad-
 judged by his creditors, upon charges against the heir ; and
 these creditors, upon procuring themselves infeft, would, in
 virtue of their adjudications, clearly exclude the right of the
 purchasers, and which behoved to defeat the effect of the ar-
 restments : so that it is humbly submitted to your Lordships,
 if, in any view of the case, the arresting creditors have either
 title or interest to insist upon their arrestments.

It was said for the arresting creditors, That as the subjects
 are sold, adjudications at the instance of the other creditors,
 would not now be competent.

But the petitioners apprehend, that the arresting creditors
 are here clearly in a mistake : for even supposing that the
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person making the sale had been full proprietor of the subjects, yet it is a clear case, that a minute of sale, or even a disposition containing warrant for infeftment, as long as it remains a personal right, will not bar adjudications at the instance of the creditors of the seller; and if the creditors-adjudgers should be infeft before infeftment follows upon the disposition, the creditors-adjudgers would be preferable: And if this would hold, even although the heir had fully vested the right of the estate in him, *multo magis* will it hold where the seller still remains in a state of apparency.

And indeed, where a sale is made by an apparent heir, it is an improper step in the creditors to attempt the diligence of arrestment. The price is not exigible by the seller until the purchaser shall have got an effectual right; so that it depends upon this condition whether the arrestments can carry any thing or not. If there should be any *medium impedimentum*, which prevents the purchaser from getting an effectual right, whether by the death of the seller in the state of apparency, or by creditors carrying off the estate by their diligence, the arrestments of the creditors would carry nothing: so that while matters remain in that situation, the proper diligence to be used, is not an attachment of the price, but the diligence of adjudication, in order to attach the estate itself.

May it therefore please your Lordships, to alter the foresaid interlocutor of the Lord Ordinary; and to find, That the foresaid two creditors cannot, under the circumstances of the present case, in virtue of their arrestments, claim any preference to the other creditors of the defunct.

According to justice, &c.

RO. MACQUEEN.

RO. MACQUEEN